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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STEPHEN M. KARADOVICH
and
TAMMY R. HARMS,
Petitioners,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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February 13, 1984

QUESTION PRESENTED FOR REVIEW

DOES THIS COURT'S HOLDING IN KATZ v. U.S. REQUIRE A WARRANT FOR A CONSTITUTIONALLY PERMISSIBLE SEARCH OF SECLUDED RURAL PROPERTY WHERE A REASONABLE EXPECTATION OF PRIVACY HAS BEEN SHOWN TO EXIST ASSUMING ARGUENDO THE SEIZURE DOES NOT INVOLVE AN INTRUSION BY OFFICERS ONTO THE CURTILAGE?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the instant proceeding, however, this is a companion case which arose out of the identical facts as another Application for Certiorari filed in this Court. That case is LOGIUDICE v. GEORGIA. The LoGiudice decision in the Georgia Court of Appeals is reported at 164 Ga. App. 709, 297 S.E.2d 499 (1982). The Georgia Supreme Court's order vacating certiorari previously granted in LoGiudice is reported at 309 S.E.2d 355 (1983).

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PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

STEPHEN M. KARLOVICH and TAMMY R. HARMS pray that a Writ of Certiorari issue to the Georgia Court of Appeals to review the decision of the Georgia Supreme Court dated and entered December 15, 1983, (Case No. 39835) denying petitioners' Motion for Rehearing of the

Georgia Supreme Court's previous decision on November 30, 1983, wherein that court vacated as improvidently granted its earlier grant of certiorari on June 8, 1983. Petitioners had asked the Court to review the February 24, 1983, decision of the Georgia Court of Appeals (Case Nos. 65277 & 65278) affirming their marijuana possession convictions and sustaining the denial of their trial Motions to Suppress evidence illegally seized.

OPINIONS BELOW

Neither the decision of the Georgia Supreme Court (Smith, J., dissenting without opinion) dated and entered December 15, 1983, denying petitioners' Motion for Rehearing nor the November 30, 1983, vacation of certiorari was reported and, because of their summary nature, are not reproduced here. The

opinion of the Georgia Court of Appeals entered on February 24, 1983, is reported at 165 Ga. App. 761, 302 S.E.2d 396 (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) which authorizes the grant of the Writ of Certiorari to the highest court of a State in a case where a right, privilege or immunity is specially claimed under the Constitution of the United States. In accordance with Rule 20(1) of this Court, this Application for Certiorari is filed within sixty (60) days of the entry of the Judgement of the Georgia Supreme Court on December 15, 1983, denying the Petitioners' Motion for Rehearing.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In 1979 Thomas LoGuidice purchased a 345 acre tract of rolling, densely wooded land in rural Upson County, Georgia, about eight miles East of Thomaston. (V.II-181,182). In the summer of 1980, Upson County Sheriff Merrill Greathouse received reports that machinery had been heard in operation at night on the LoGiudice property. (V.II-53,54). An unidentified source

told the sheriff in the Fall of that year that LoGiudice had hired a local contractor to dig a well on the land, directed him to lay water pipe from the well a distance into the woods, discharged him, and told him he would finish the job himself. (V.II-26).

Sometime in the fall of 1980 the sheriff climbed barbed wire and welded fences to gain entry and "walked-over" the property searching for marijuana. He found none. (V.II-27,56). Later that fall the sheriff conducted an aerial search of the property but was only able to ascertain the construction of a new fence by LoGiudice around his property. (V.II-26,58,77). The sheriff knew the property belonged to LoGiudice because he had checked the property tax records. (V.II-57).

On July 6, 1981, acting on

unspecified information from an unidentified source, the sheriff and a group of Georgia Bureau of Investigation (G.B.I.) agents entered the property to search for marijuana. (V.II-61,65). The officers took a back route onto the subject property by crossing a creek, climbing a barbed wire fence, and following an old logging road. (V.II-62). They discovered an enclosed one half acre plot of marijuana growing about 35 feet from and, in the sheriff's words, "adjacent to", a small travel trailer in which Tammy Harms, LoGiudice's sister-in-law, was living. (V.II-64,22,66,142). The trailer belonged to LoGiudice and was connected to the patch by a path. (V.II-22,177). It was necessary to come within ten feet of the plot to ascertain its contents because of a tall chicken wire fence

surrounding it. (V.II-22,66,67,142). The plot was about 300 feet from the nearest property line and was not visible beyond the LoGiudice property boundaries. (V.II-78, 142). The officers watched the plot for four and one half to six hours and saw Ms. Harms come into the enclosure and "fondle" the plants. No arrests were made that day. (V.II-27,67).

On July 7, 1981, the officers returned to the property and arrested Ms. Harms and Stephen Karlovich on or near the plot. (V.II-31). The sheriff then left, drove into Thomaston and procurred a search warrant. (V.II-31,59). As he was leaving the property, the sheriff, for the first time, he said, noticed that one of the two locked gates blocking the private access road leading onto the property was posted with a "no

trespassing" sign. (V.II-21,59). The realtor who had handled the sale of the property to LoGiudice testified that the property was fenced and posted when LoGiudice purchased it in 1979. (V.II-181,182).

LoGiudice, Harms and Karlovich were separately indicted and all three filed Motions to Suppress in the trial court. The motions were denied and the three were convicted by a bench trial on September 2, 1981. (V.II-187; T.-1 to 10; V.I-1 to 34). The transcript of the separate LoGiudice suppression hearing was incorporated by stipulation into these petitioners' record. (T.-3).

The Georgia Court of Appeals consolidated the Harms and Karlovich cases, reviewed the convictions and the denials of their motions to suppress and affirmed the actions of the trial court.

The court ruled that the area searched was not within the curtilage of Ms. Harms' dwelling but an "open field" and therefore not subject to the warrant requirement of the 4th Amendment. The opinion went on to conclude that as neither Karlovich nor Harms owned the property they lacked standing to complain. 165 Ga. App. at 762, 763. A different panel of the Court of Appeals found LoGiudice lacked standing because he did not reside in the trailer but elsewhere on the property and it was "possible" the marijuana patch was not within the curtilage of the Harms dwelling. 164 Ga. App. at 710. The Georgia Supreme Court initially denied, then granted certiorari, heard oral arguments and received briefs, then vacated certiorari in both cases. Justice Smith issued a strongly worded

dissent to the LoGiudice order vacating certiorari and dissented without opinion in the Karlovich and Harms decision. Justice Smith's dissent is reported at 309 S.E.2d at 355 to 362, and is reproduced and appended to LoGiudice's petition for certiorari which has been filed with this Court.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE GEORGIA SUPREME COURT CONFLICTS WITH THOSE OF OTHER STATE COURTS OF LAST RESORT INVOLVING THE QUESTION OF WHETHER THE PER SE "OPEN FIELDS" EXCEPTION TO THE WARRANT REQUIREMENT FASHIONED FROM THIS COURT'S DECISIONS IN HESTER v. U.S. AND OLMSTEAD v. U.S. IS INCONSISTANT WITH THIS COURT'S SUBSEQUENT DECISION IN KATZ v. U.S.. THE QUESTION HAS NOT BEEN SETTLED BY THIS COURT.

The Georgia Supreme Court, by declining to review the February 24, 1983, decision of the Georgia Court of Appeals, endorsed the analysis applied by that court. The Court of Appeals focused on the location of the seized substance and the property interests of the petitioners in concluding they had no standing to complain of the search:

> As to Karlovich, the trial court did not err in denying the motion to suppress. He had no standing to question the search of an open field lying on property owned by another and in which he had no proprietary interest. ANDERSON v. STATE, 133 Ga. App. 45, 46(1)(209 S.E.2d 665). See also BRISBANE v. STATE, 233 GA. 339, 345 (211 S.E.2d 294); CUEVAS v. STATE, 151 Ga. App. 605, 610 (260 S.E.2d 737).
>
> Neither did the trial court err as to the denial of the motion by Harms. Though the argument was made that the marijuana was only 35 feet from the trailer occupied by Ms. Harms and thus arguably was within

the curtilage of her home, the facts clearly show to the contrary. The field was separated from her residence as surely as from that of LoGiudice (1,700 feet). The curtilage pertains to land used as a part of one's home and therefore is under the same protection afforded the homesite by the Fourth Amendment to the Constitution. It is obvious however from the facts that Ms. Harms did not use the marijuana field as a part of her homesite (i.e., as a vegetable or flower garden, for use of pets or her own recreation). This field was separated from her trailer and only part of the trailer was visible from the ten-foot chicken wire fence surrounding the field. In fact the marijuana was not visible to the eye further than ten feet from the field and obversely the inference is reasonably inescapable that one could not see the trailer from within the field. Thus Ms. Harms is faced with the same problem faced by Karlovich. The field was indeed nothing more than that - an open field and not a part of her homesite. She likewise has no standing to controvert the search of an open field owned by another.

KARLOVICH, et al. v. STATE, 165 Ga. App. 761, 762, 763, 302 S.E.2d 396 (1983).

Petitioners do not concede the

patch was without the curtilage of the Harms dwelling. See McGEE v. STATE, 133 Ga. App. 184, 210 S.E.2d 355 (1974) (a shed 45 to 60 feet from house within curtilage); NORMAN v. STATE, 134 Ga. App. 767, 216 S.E.2d 644 (1975) (a truck 200 feet from dwelling held within curtilage); WALKER v. STATE, 140 Ga. App. 418, 231 S.E.2d 386 (1976) (styrofoam cooler 100 yards from house at end of path within curtilage); BROOKS v. STATE, 140 Ga. App. 371, 231 S.E.2d 138 (1976) (presence of path from house gives rise to presumption of control over items at end thereof). However, even assuming arguendo the patch was without the curtilage of the dwelling the Court of Appeals opinion fails to address the principal argument progressed by petitioners that the evidence showed these petitioners had,

"...exhibited an actual (subjective) expectation of privacy and ... that the expectation is one which society is prepared to recognize as reasonable." KATZ v. U.S., 389 U.S. 347, 361 (1967) (Harlan, J. concurring). Rather, the Court of Appeals' analysis in these petitioners' and LoGiudice's cases conclude with its determination that the patch was not within the curtilage of the petitioners' respective dwellings. The Georgia courts have apparently concluded that, at least in the case of rural property, there can never be a reasonable expectation of privacy such as to necessitate the procurement of a warrant before a valid search of an area outside the curtilage can occur. The Court of Appeals' opinion in the LoGiudice case relies upon this court's decision in HESTER v. U.S., 256 U.S. 57

(1924), in reaching its conclusion. This court's decisions in HESTER and OLMSTEAD v. U.S., 277 U.S. 438 (1928), form the basis for what has come to be known as the "open fields" exception to the warrant requirement. See GIDDENS v. STATE, 156 Ga. App. 258, 259 (1980).

Courts of Last Resort in other states have sharply departed from the reasoning adopted by the Georgia courts.

In LOUISIANA v. BYERS, 359 So.2d 84 (La. Sup. Ct. 1978), a case involving facts similar to those in the case at bar, the court invalidated a warrantless search of a 640 acre tract of land to observe a plot of growing marijuana. There the court found:

> In the present case the marijuana was not visible from the public road. The posted signs announced that the logging road was private and prohibited entry of the land. A

> chain barred access to the private road, though it was down at the time of arrest and seizure. We conclude under these circumstances, the defendants had a legitimate expectation of privacy.

BYERS, 359 So.2d 84.

In TENNESSEE v. WERT, 550 S.W.2d 1 (Tenn. Crim. 1977) (Cert. Denied), the Tennessee Court of Criminal Appeals held that where the defendant's 50 acre farm was enclosed by a fence, with the exception of about 400 feet fronting a road, and police, acting on information from informers, entered the farm from a wooded area near the road and found a marijuana patch, the warrantless search violated both Federal and State Constitutions despite the State's contention that since the marijuana patch was found in the open fields of the farm, it was an area unprotected by the Fourth Amendment's guarantees

against unreasonable searches and seizures. In TENNESSEE v. LAKIN, 588 S.W.2d 544 (Tenn. Sup. Ct. 1979), warrantless officers, acting on an informer's tip, walked about one fourth of a mile onto the defendant's property to observe marijuana growing. The opinion does not indicate whether, as here, the property was posted, fenced or locked down. Although the court noted, "[p]robably the area in which the marijuana was found was outside the 'curtilage' of the residence as that term is usually understood..."[588 S.W.2d at 547], it nevertheless concluded:

> Ordinarily officers searching occupied, fenced, private property must first obtain consent or a warrant; otherwise they proceed at the risk that evidence obtained may be suppressed. When a warrantless search is challenged, an exception

> to the warrant requirement must be shown.

LAKIN, 588 S.W.2d at 549.

In FLORIDA v. BRADY, 406 So.2d 1093 (Fla. Sup. Ct. 1981), officers used a vehicle to crash through a locked gate to gain access to a 1800 acre tract of posted and fenced property. The case was decided adversely to the State in the Florida Supreme Court and certiorari to this Court was sought. Certiorari was granted by this court at 456 U.S. 988 (No. 81-1636) and the case is currently awaiting decision. In its opinion the Florida Supreme Court stated:

> Although the HESTER doctrine has not been overuled, subsequent opinions indicate that the open fields doctrine cannot be used as a carte blanche for a warrantless search simply because the location is not part of a dwelling or its adjacent curtilage. As the court later observed in its opinion in

> KATZ v. U.S., [cits ommited] ... 'the Fourth Amendment protects people not places'. ... Our opinion in NORMAN [v. STATE, 379 So.2d 643 (Fla. Sup. Ct. 1980)], made it clear that fences and locked gates are evidence of the owner's or possessor's expectation of privacy. (Emphasis Added)

BRADY, 406 So.2d at 1095, 1096.

The Maine Supreme Judicial Court, in MAINE v. THORNTON, 453 A.2d 489 (Me. Sup. Jud. Ct. 1982), reviewed a warrantless search for marijuana on a large tract of heavilly wooded property. There, as here, the marijuana was not visible from outside the property boundaries. The property was bounded by an old stone wall and barbed wire and posted with "No Trespassing" signs. The Maine Court found a reasonable expectation of privacy to exist and suppressed the evidence. THORNTON too has been granted certiorari by this

Court. The grant is reported at 75 L.Ed.2d 944, 103 S.Ct. 1520 (No. 82-1273).

BRADY and THORNTON, supra, have been consolidated for review in this Court with a case from the Federal 6th Circuit Court of Appeals, U.S. v. OLIVER, 686 F.2d 356 (6th Cir. 1982) (en banc), Cert. Granted 103 S.Ct. 812 (1983). OLIVER also involved the warrantless search of a large wooded, posted and fenced tract of land on which a plot of marijuana was growing. The case was initially decided by the Court of Appeals in favor of the defendant but on rehearing issued an en banc 5 to 4 decision adverse to Oliver. The opinion strongly suggests its decision might have been different had, as here, there been persons living in the area adjacent to the marijuana. OLIVER, 686 F.2d at

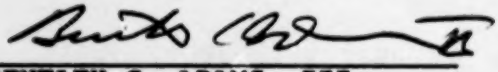
360. Judge Keith issued a forceful dissent for the OLIVER minority which appears at 686 F.2d 361 to 373. This Court has indicated its consideration of OLIVER will center on whether the Open Fields doctrine developed from HESTER, supra, has been modified by the holding in KATZ, supra.

CONCLUSION

The Georgia Supreme Court's failure to grant review of the Georgia Court of Appeals' decision in this case leaves standing a decision which applies a rigid locational approach to the resolution of 4th Amendment questions at least with respect to warrantless searches of large tracts of private property. That view holds that unless the area searched is within the curtilage of a dwelling, there is no warrant required for a search thereof. This view is in total disharmony with the decisions of several other states' courts of last resort in cases involving facts substantially similar to the instant matter. Those decisions have focused upon the question of whether a reasonable expectation of privacy has been shown to exist in the area

searched. Under these holdings the proximity of the area searched to a dwelling and its surrounding curtilage may be considered in evaluating whether a reasonable expectation of privacy has been shown to exist. Such decisions recognize there are quite often no 4th Amendment protections for activities conducted beyond the dwelling and its curtilage, but they do not ignore the possibility that where the occupiers of such an area have taken substantial steps to exclude the public, a reasonable expectation of privacy and, hence, Fourth Amendment protections may exist. Because of the obvious lack of consistancy now existing between the Georgia courts and other state courts of last resort and because this Court has granted review in the factually similar OLIVER, BRADY and THORNTON cases, the

grant of the writ is particularly appropriate in this instance. Certiorari should be granted and the case set for full briefing and oral argument.



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CERTIFICATE OF SERVICE

This is to certify that I have this date served one copy of the within and foregoing Petition for Writ of Certtiorari upon the Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 and upon the District Attorney for the Griffin Judicial Circuit, 2nd Floor, Upson County Courthouse Annex, Thomaston, Georgia 30286 by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This 13th day of February, 1984.

BENTLEY C. ADAMS, III